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**CONGRESSIONAL D-DAY: SAVING PRIVATE RYAN
FROM JURISDICTIONAL DEATH
PROPOSALS TO CONGRESS TO IMPROVE JUDICIAL SCRUTINY
OF MILITARY PERSONNEL DECISIONS**

BY

**COLONEL ROBERT C. McFETRIDGE
SENIOR SERVICE COLLEGE FELLOW, U.S. ARMY
U.S. DEPARTMENT OF JUSTICE**

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Congressional D-Day: Saving Private Ryan From Jurisdictional Death

Proposals to Congress
to Improve Judicial Scrutiny
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Robert C. McFetridge
Colonel, U.S. Army

U.S. Army War College
Senior Service College Fellowship
U.S. Department of Justice

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ABSTRACT

AUTHOR: Colonel Robert C. McFetridge

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Before World War II, civilian judges granted great deference to military administrative personnel determinations, citing the military's specialized expertise and Congress's Constitutional rule-making authority over military affairs. After the war, however, things began to change. Congress terminated its practice of acting on the claims of service members through private relief legislation. Instead, Congress vested authority in the Service Secretaries to establish boards to address service members' claims. Through these administrative review boards the Service Secretaries were empowered to change military records to correct errors and remove injustices. Over the years these decisions became subject to judicial review as Congress passed new laws waiving the Government's sovereign immunity and providing jurisdictional bases for lawsuits.

Today, these laws and diverse judicial interpretations have created confusing and contradictory procedures for resolving military disputes. Service members and veterans seeking judicial relief cannot accurately predict what law applies to their case, where or when they must file their lawsuit, and whether they must exhaust their administrative remedies prior to filing suit. Once in court, the wasteful practice of "litigating where to litigate" has become commonplace. The metaphorical Private Ryans of our military are in a quagmire, caught in a devastating legal cross-fire, and it is time for Congress to come to their rescue by enacting curative legislation.

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I. Introduction

A. Who Is Private Ryan?

"Private Ryan" is a metaphor for all of the dedicated American fighting men and women who serve their country--past, present, and future. The name was borrowed from a main character in Steven Spielberg's 1998 Academy Award winning motion picture entitled, "Saving Private Ryan." The movie vividly depicts the brutality of combat during the allied invasion of France on D-Day, June 6, 1944, and the heroic nature of soldiers willing to sacrifice everything for a noble cause.

In the film the mission was to rescue Private Ryan from the prospect of being killed in action as a front line infantryman in World War II. This unusual assignment was issued after Army leaders learned that Private Ryan's brothers had all recently died in combat. Ryan's superiors wanted to halt the inordinate sacrifice born by this one American family, so they ordered a rescue mission to locate and save Private Ryan from the continuing carnage of war. They wanted to send Private Ryan home, alive.

Private Ryan was just an ordinary soldier performing the extraordinary duties of a soldier in combat. The heroism captured so well in the film, however, was not his alone--it radiated from the heroic contributions of all the Private Ryans of that generation who sacrificed so much to save the world for democracy.

B. Why Does Private Ryan Need To Be Rescued Again?

Reawakening a powerful image like Private Ryan's, even 55 years after World War II, may breathe life into otherwise mundane and technical matters of administrative and judicial

review of military personnel decisions. Congress needs to appreciate that the current system is cumbersome and broken. This paper suggests that the nation that saved Private Ryan from the fields of Normandy can do a much better job of saving Private Ryan, and his superiors, from the turmoil, emotional strain, frustration, time, and expense of pursuing military personnel disputes in federal court.

Over the years, Congress has heaped a great number of litigation tools into Private Ryan's rucksack.¹ But with each benign action, Congress encouraged judicial expansion into virtually every aspect of Private Ryan's military life. What Congress has failed to appreciate, however, is that this generous load of civilianized adjudication has become too unbalanced and unwieldy for Private Ryan to bear--and it is not conducive to the military's mission. In the current complex state of military personnel law, Private Ryan may drown in litigation before ever reaching the beach, even with a personal lawyer swimming frantically at his side. What both the Army and Private Ryan really need are simpler, nonadversarial tools for dispute resolution--not more avenues for contentious litigation. Congress can fix these problems as soon as it recognizes that the procedures established to efficiently review and resolve the complaints of service members are no longer working the way they were originally intended. It is time for Congress to act.

Private Ryan needs to be saved from unnecessary inefficiency and bureaucracy in the process,

¹ For example: the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, waives the Government's sovereign immunity from suits seeking nonmonetary relief; the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, waives the Government's immunity from suits seeking nontort monetary damages; and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2780, waives the Government's immunity from certain types of tort claims. There are also numerous statutes authorizing federal courts to take jurisdiction in military cases: 28 U.S.C. § 1331 (Federal Question Jurisdiction); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. §§ 2241-2255 (Habeas Corpus); 28 U.S.C. § 1343 (Civil Rights); 5 U.S.C. § 552(a)(4) (Freedom of Information Act) (FOIA); 5 U.S.C. § 552a(g)(1) (Privacy Act); and the FTCA and Tucker Act (cited above).

and the process itself needs to be saved from the uncontrolled growth of civil litigation .

C. Background

Congress has never expressly regulated the judiciary's review of military determinations. Before World War II, military personnel decisions were largely immune from judicial review in civilian courts of law.² Judges granted great deference to discretionary military determinations, citing the military's specialized expertise and Congress's Constitutional rule-making authority over military affairs.³ After the Second World War, however, things began to change. Congress terminated its practice of reviewing and acting on the claims of service members through private relief legislation.⁴ Instead, Congress vested authority in the Service Secretaries to establish

² Before the APA waived the Government's sovereign immunity from judicial review of agency actions, case law evinced a presumption of nonreviewability for military decisions. *See, e.g.,* *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), at 515-16: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." This general presumption persisted until the late 1950s, when it was effectively replaced with a presumption favoring reviewability. *See, e.g.,* *Harmon v. Brucker*, 355 U.S. 579 (1958).

³ *See, e.g.,* *Orloff v. Willoughby*, 345 U.S. 83 (1953), at 93-94:

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

⁴ The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, § 131, 2 U.S.C. § 190g (1988), states: "No private bill or resolution...and no amendment to any bill or resolution,

departmental boards to address service members' claims.⁵ Through these administrative review boards, the Service Secretaries were empowered to change military records to correct errors and remove injustices. Over the years, these correction board decisions have become subject to extensive judicial review in federal courts⁶ pursuant to federal question jurisdiction and the Administrative Procedure Act's general waiver of the government's sovereign immunity from civil suits.⁷

Today, these laws and diverse judicial interpretations among the circuit courts of appeal have created confusing and contradictory procedures for resolving complaints involving military personnel matters. Service members and former service members seeking judicial relief cannot accurately predict what law applies to their case, where or when they must file their lawsuit, and whether they must exhaust their administrative remedies prior to filing suit. Once in court, the wasteful practice of "litigating where to litigate" has become commonplace. The metaphorical Private Ryans of our military are in a quagmire, caught in devastating legal cross-fires, and it is

authorizing or directing...the correction of a military or naval record, shall be received or considered in either the Senate or the House of representatives."

⁵ *Id.* § 207. 10 U.S.C. §1552(a)(1) (1992), provides:

The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

⁶ See the voluminous notes of judicial decisions interpreting 10 U.S.C.A. § 1552 (West 1998).

⁷ The APA was originally enacted in 1946. Section 702 was amended in 1976 to eliminate the sovereign immunity bar in suits against the government seeking nonmonetary relief. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (codified at 5 U.S.C. § 702).

time for Congress to come to their rescue. It's D-Day 1999, and Congress needs to take immediate action to simplify and improve the procedures for administrative and judicial review of military personnel decisions.

II. Current Problem Areas

A. The Boards For Correction of Military Records

Congress authorized the creation of military correction boards in the Legislative Reorganization Act of 1946.⁸ One principal reason for the legislation was a desire to free Congress from the burdensome task of reviewing complaints and considering private relief bills for military personnel.⁹ Although the act of denying private relief legislation had never constituted a specific cause of action subject to judicial review, in and of itself, Congress apparently did not intend to foreclose judicial review of correction board decisions.¹⁰ Regardless of Congressional intent, the body of case law supporting traditional judicial deference to military decisions has eroded over the years. Courts interpreting the plain and permissive language of the APA often have difficulty reconciling that statute with prior common law defining the scope of judicial review for military personnel decisions.

⁸ *Supra* note 4.

⁹ 40 Op. Atty. Gen. 504, 505 (1947); Jeffrey M. Glosser and Keith A. Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U. L. REV. 391, 392 (1973).

¹⁰ *Ogden v. Zuckert*, 298 F.2d 312 (D.C. Cir. 1961); *Friedman v. United States*, 158 F. Supp. 364, 375-76 (Ct. Cl. 1958) (Congress deleted language which would have made correction board decisions final and nonreviewable by the courts, while preserving language making those determinations final and conclusive as to other agencies and officers of the United States).

Most courts have now concluded that the APA applies to judicial review of military determinations.¹¹ Notwithstanding that development, there remains a large body of common law supporting the proposition that not all military issues may be reviewed by the courts.¹² Military litigators routinely usher these cases forth to establish issue preclusion, even where a court is taking jurisdiction over a case under the APA or Tucker Act. Consequently, a comprehensive, issue-by-issue analysis often must be performed to identify and separate the reviewable issues from nonreviewable issues presented in a correction board's administrative record of its decision.

In the past, critics of the military correction board procedures have alleged that the boards take too long to render their decisions, seldom grant personal hearings, and rely too heavily upon advisory opinions rendered by the military department staffs. All of these major criticisms could

¹¹ See *Dronenberg v. Zech*, 741 F.2d 1388, 1390 (D.C. Cir. 1984); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3rd Cir. 1978), *cert. denied*, 441 U.S. 961 (1979); *Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976); Captain John B. McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 MIL. L. REV. 89, 115-16 (1985).

¹² After a comprehensive review of existing case law, the United States Court of Appeals for the Fifth Circuit formulated a widely (but not uniformly) accepted test for the reviewability of internal military affairs in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

From this broad ranging, but certainly not exhaustive, view of the case law, we have distilled the primary conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. *Id.* at 201.

Even if those conditions are met, a court should examine the substance of the allegations in light of the policy reasons behind nonreview of military matters, and consider four additional factors: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Id.* at 201-02.

be redressed if sufficient additional resources were allocated to the correction boards for these perceived shortcomings. For example, the time it takes to process an application for relief could be reduced by substantially increasing the number of case reviewers and staff assigned to process cases and retrieve military personnel records. Although the necessity of holding formal hearings is debatable, that option is also a function of available time and resources. Should Congress desire to enhance the administrative due process afforded service members, it must be willing to fund those additional requirements.

The criticism that the correction boards rely too heavily upon advisory opinions prepared by the professional staffs of the various military departments implies that those opinions may be inherently biased or deficient for the purpose of advising the boards on the merits of military complaints. If that general proposition were true--that federal agencies are inherently incapable of investigating themselves--most agency Inspector Generals would be out of business. It is precisely the professional knowledge and comprehensive advice of the subject matter experts that permit the civilian leadership to properly evaluate military complaints. But if the misperception that "the fox is guarding the hen house" warrants addressing, it again devolves into a question of resources. It would not be difficult to assign independent experts to assist the correction boards mediate their nonadversarial review of applications for relief.¹³

Current applicants to the military correction boards should find that most of these criticisms are no longer valid.¹⁴ In 1996, Congress directed the Department of Defense (DOD) to

¹³ The Army, for example, already has numerous safeguards in place to ensure that military defense counsel and military judges can perform their duties with complete independence.

¹⁴ Interviews with Karl F. Schneider, Deputy Assistant Secretary (Army Review Boards) and Loren G. Harrell, Director, Army Board for Correction of Military Records, in Crystal City,

review correction board practices with a view towards improving the overall correction board process.¹⁵ The Department of Defense addressed seven specific issues identified by Congress¹⁶ and submitted a report of its findings on April 3, 1997.¹⁷ In response to the DOD Correction Board Study, Congress passed several new laws pertaining to military correction boards in the

Virginia (April 14, 1999). Both officials expressed confidence in the integrity, independence, and ability of the Army Review Board Agency to accomplish its mission to: "Serve the soldier and the veteran in a courteous and timely manner; decide their cases on behalf of the Secretary of the Army with justice, equity, and compassion, and in the public interest; and present our decisions in clear and concise responses."

¹⁵ The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 554(a), 110 Stat. 318, directed:

The Secretary of Defense shall review the system and procedures for the correction of military records used by the Secretaries of the military departments in the exercise of authority under section 1552 of title 10, United States Code, in order to identify potential improvements that could be made in the process for correcting military records to ensure fairness, equity, and (consistent with appropriate service to applicants) maximum efficiency.

¹⁶ Section 554(b) of the FY 96 Authorization Act identified the following areas for review:

- (1) The composition of the board and of the support staff for the board;
- (2) Timeliness of action;
- (3) Independence of deliberations by the civilian board;
- (4) The authority of the Secretary of the military department concerned to modify the recommendations of the board;
- (5) Burden of proof and other evidentiary standards;
- (6) Alternative methods for correcting military records; and
- (7) Whether the board should be consolidated with the Discharge Review Board of the military department.

¹⁷ The Secretary of Defense recommended retention of the current structure for the correction boards, concluding that although certain procedures and practices could be improved, the current system was equitable and efficient. REPORT, DEPARTMENT OF DEFENSE, NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 1996, SECTION 554, REVIEW OF SYSTEM FOR CORRECTION OF MILITARY RECORDS, at 19-21 [hereinafter "DOD CORRECTION BOARD STUDY"].

Strom Thurmond National Defense Authorization Act for Fiscal Year 1999.¹⁸ The Authorization Act amends 10 U.S.C. § 1552 and adds three new board-related provisions designed to increase the efficiency and timeliness of correction board actions.

B. Tucker Act Jurisdiction Versus the Administrative Procedure Act

If an applicant is unhappy with a decision of a military correction board, he or she may sue, seeking judicial review of the final agency decision. The burden is on the plaintiff in federal court to plead and prove the subject matter jurisdiction of the court.¹⁹ Unfortunately, the two statutes most commonly relied upon by plaintiffs seeking to establish a proper foundation for federal court jurisdiction are inherently confusing and inconsistent--the Tucker Act (which waives sovereign immunity and defines jurisdiction for courts adjudicating nontort money damage claims against the United States) and the APA (which waives sovereign immunity for nonmonetary relief against the United States and permits judicial review when coupled with federal question jurisdiction or another jurisdictional statute).

The Tucker Act has two jurisdictional rules based upon the amount of damages at issue. Generally, damages under \$10,000 may be adjudicated in federal district courts, whereas

¹⁸ Pub. L. No. 105-261, 112 Stat. 1920 (1998), § 541 (placing a temporary freeze on correction board personnel reductions); § 542 (requiring at least one attorney and one physician on correction board staff); § 543 (prohibiting ex parte communications when processing applications); § 544 (establishing 10 months as the processing time goal for completing all correction board actions, phased-in over a 10 year period); and § 545 (amending 10 U.S.C. § 1552 by defining "military record"; and requiring the Secretary of Defense to report on whether the correction boards should be empowered to waive the six-year statute of limitations for retroactive benefits contained in 31 U.S.C. § 3702).

¹⁹ *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936).

damages of \$10,000 or more fall within the exclusive jurisdiction of the United States Court of Federal Claims.²⁰ The "Little Tucker Act," 28 U.S.C. § 1346(a)(2) provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort....

Similarly, the "Big Tucker Act," 28 U.S.C. § 1491, vests the United States Court of Federal Claims with exclusive jurisdiction over nontort money damages against the United States exceeding \$10,000, based upon the same kinds of claims. Thus, district courts may sit as "minor claims courts" in military back pay cases but they lose jurisdiction to the Court of Federal Claims if money damages exceed \$10,000.²¹ Appeals under the Tucker Act go before the United States Court of Appeals for the Federal Circuit,²² pursuant to 28 U.S.C. § 1295(a)(2), which provides: "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction— (2) of an appeal from a final decision of a district court of the United States...if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title."

Most military plaintiffs, and many of their attorneys, have very little awareness and

²⁰ The Court of Federal Claims has concurrent jurisdiction with the district courts for damage claims under \$10,000.

²¹ "The Tucker Act did no more than authorize the District Court to sit as a court of claims and...the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims." *Richardson v. Morris*, 409 U.S. 464, 466 (1973).

²² "The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals under the Tucker Act for non-tort money damages against the United States." *United States v. Hohri*, 479 U.S. 960 (1987).

appreciation for how these sovereign immunity waivers and jurisdictional statutes interrelate. Typically, a military plaintiff may have represented himself before the correction board,²³ or after leaving the service may have retained a local attorney (with reasonable rates) to help him with the process. As they enter the civil litigation arena, often in the closest district court to where the service member now resides, neither the plaintiff nor his attorney are usually prepared for the complex jurisdictional issues with which they are confronted.

The usual litigation scenario plays out as follows.²⁴ Instead of answering the complaint, the Government will immediately move to dismiss the case or move for summary judgment based upon the correction board's decision. Frequently, a plaintiff will have failed to plead and prove the basis for the court's jurisdiction. If properly pled, plaintiff and his attorney will be surprised to learn that the amount of damages they had hoped to receive due to the government's allegedly arbitrary and capricious conduct is limited to \$10,000 under the Little Tucker Act. Most wrongful discharge cases involving reimbursement of back pay will exceed that threshold. Some plaintiffs and counsel will waive all damages in excess of \$10,000 just to remain in the district court; the others must start over, or move to transfer their case to the United States Court of Federal Claims. Those plaintiffs who remain in the district court are next confounded with the complexities of issue preclusion and the limited scope of review for military cases. They will diligently assemble the most persuasive case law they can find in the district court's jurisdiction,

²³ According to the DOD Correction Board Study, most applicants to the correction boards do not retain legal counsel. *Supra* note 17, at 16.

²⁴ These observations are based upon the author's personal experiences while serving a three-year assignment as a military personnel litigation attorney defending Army Correction Board decisions in federal district courts and in the United States Court of Federal Claims.

only to discover that none of it applies. Tucker Act cases follow the law of the Federal Circuit, which adopts all of the old "Claims Court" cases involving military pay. Routinely, summary judgment will be entered against the plaintiff, who, even at this point, doesn't understand why he didn't get "his day in court." Plaintiffs then usually appeal the district court's judgment to the circuit court of appeal, which is, of course, the wrong appellate court for military pay cases brought under the Tucker Act. No one is well served by this waste of time and judicial resources.

Some plaintiffs and their counsel seek review of a correction board decision under the Administrative Procedure Act (APA). However, the first legal hurdle they experience is that Section 702 of the APA only waives the Government's sovereign immunity from suits seeking relief other than monetary damages. Section 702 provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages (emphasis added) and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States....

Consequently, judicial review under the APA may not be appropriate for the majority of military plaintiffs seeking reinstatement, promotion, back pay, financial adjustments, or money damages. This result is reinforced by Section 704 of the APA, which describes what kinds of actions are reviewable: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court (emphasis added) are subject to judicial review." There is no question that United States Court of Federal Claims has jurisdiction over military pay cases, and that it can afford complete relief, including appropriate equitable relief incident to granting a

money judgment.²⁵

Thus, only those military plaintiffs who are seeking solely injunctive or declaratory relief, or judicial review of equitable or legal determinations having no monetary consequences, logically should be permitted to proceed against the military directly under the APA in a district court. The APA does not apply, however, if another statute precludes judicial review of a particular matter, or where it is manifest that agency action has been committed to agency discretion by law.²⁶ This latter exception is often litigated in military determinations involving significant discretion, especially where the discretionary power is broadly defined and a court would have no measurable standards against which to evaluate the military's discretion for an abuse.²⁷

An extraordinary example of military personnel litigation running amuck is the case of *Pacyna v. Marsh*.²⁸ This litigation odyssey helps demonstrate why Private Ryan's rucksack,

²⁵ *Hoop Valley Tribe v. United States*, 596 F.2d 435 (Ct. Cl. 1979); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979). 28 U.S.C. § 1491(a)(2) states:

To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

²⁶ 5 U.S.C. § 701(a).

²⁷ See *Webster v. Doe*, 486 U.S. 592 (1988); *Heckler v. Chaney*, 470 U.S. 821 (1985).

²⁸ 617 F. Supp. 101 (W.D.N.Y. 1984), *aff'd*, 751 F.2d 374 (Table) (2nd Cir. (N.Y.) Nov 29, 1984) (No. 84-6200), *cert. granted* (vacated and remanded for transfer to the United States Court of Appeals for the Federal Circuit), 474 U.S. 1078 (U.S., Jan 21, 1986) (No. 84-1706) (Mem),

overloaded with legal due process, may not be the best solution for resolving soldiers' problems. In 1952, the Army denied Master Sergeant (MSG) Clement J. Pacyna an appointment as a warrant officer. Despite favorable recommendations from his chain-of-command, the Counter-Intelligence Corps (CIC) ultimately declined to appoint MSG Pacyna because he did not meet the educational requirements for the position.²⁹ Master Sergeant Pacyna took no further action on the matter, and retired from the Army ten years later in 1962.

In 1979, MSG Pacyna obtained his military personnel records, and on June 13, 1980, he filed an application with the Army Board for the Correction of Military Records (ABCMR), seeking a promotion to warrant officer, retroactive to 1952. Despite his untimely application, the ABCMR reviewed MSG Pacyna's case, but found no error or injustice in the case, and denied him relief on February 25, 1981. Master Sergeant Pacyna sought reconsideration on four separate occasions, but all of his requests were denied.

On February 23, 1983, MSG Pacyna sued the Army in the United States District Court for the Western District of New York. He and his lawyer cited the Little Tucker Act and sought a retroactive promotion, back pay, and the increased retired pay of a warrant officer. After the initial filings, MSG Pacyna and counsel waived damages in excess of \$10,000 in order to stay in the district court.³⁰ The district court then granted the Army's motion for summary judgment,

aff'd, 809 F.2d (Fed. Cir., Nov 13, 1986) (No. 86-1488) (Table), *cert. denied*, 481 U.S. 1948 (U.S., May 18, 1987) (No. 86-1136) (Mem), *pet. for reh'g denied*, 483 U.S. 1034 (U.S., Jun 26, 1987) (Mem).

²⁹ Master Sergeant Pacyna left high school in the ninth grade, but later obtained a high school equivalency degree. The CIC warrant officer program called for two years of college or the equivalent.

³⁰ The "usual litigation scenario" described above.

holding that Pacyna's claim was barred by the district court's six-year statute of limitations.³¹

The United States Court of Appeals for the Second Circuit affirmed the decision in an unpublished judgment order.³² Master Sergeant Pacyna then petitioned for a writ of certiorari to the United States Supreme Court. Since the Second Circuit technically was the wrong appellate court to have affirmed a district court decision based upon the Tucker Act, the Supreme Court granted certiorari, vacated the Second Circuit's action, and remanded the case for transfer to the United States Court of Appeals for the Federal Circuit.³³

The Federal Circuit unanimously affirmed the district court in an unpublished per curiam opinion.³⁴ Undeterred, MSG Pacyna again sought a writ of certiorari to the Supreme Court (which was denied), followed by a request for a rehearing (also denied).³⁵ Master Sergeant Pacyna's lawyer probably lost interest in pursuing this case back in the district court when MSG Pacyna waived his damages in excess of \$10,000; however, MSG Pacyna was still determined to get his day in court. He wanted a court to review of the 1981 ABCMR decision denying him relief (and its subsequent denials of reconsideration). Master Sergeant Pacyna filed a *pro se* suit in the Court of Federal Claims, expressly alleging that he was not seeking money damages, but seeking only an APA review of the ABCMR decision. Pacyna had picked precisely the wrong

³¹ See *supra*, note 28.

³² Pacyna v. Marsh, 751 F.2d 374 (2nd Cir. (N.Y.) Nov 29, 1984) (No. 84-6200) (Table).

³³ Pacyna v. Marsh, 474 U.S. 1078 (U.S., Jan 21, 1986) (No. 84-1706) (Mem).

³⁴ Pacyna v. Marsh, 809 F.2d 792 (Fed. Cir., Nov 13, 1986) (No. 86-1488) (Table).

³⁵ Pacyna v. Marsh, 481 U.S. 1948 (U.S., May 18, 1987) (No. 86-1136) (Mem), *pet. for reh'g denied*, 483 U.S. 1034 (U.S., Jun 26, 1987) (Mem).

court for that approach, but there was certainly legal authority among various conflicting jurisdictions in support of the proposition that an APA review of an ABCMR decision would be permissible in a district court notwithstanding a time bar on the underlying complaints. Master Sergeant Pacyna voluntarily dismissed his suit in the Court of Federal Claims³⁶...and promptly filed suit in the Western District of New York for the second time. He now carefully articulated an APA theory of review of the correction board decision and intentionally left ambiguous whether or not he expected any monetary relief to result. Some jurisdictions would have allowed that approach,³⁷ but much to MSG Pacyna's chagrin, the district court did not even discuss the issue. Instead, the district court dismissed the complaint on the ground that it was barred by the doctrine of *res judicata*.³⁸ He lost again on appeal (this time properly denied by the Second Circuit)³⁹ and the United States Supreme Court denied his petition for certiorari.⁴⁰ Apparently,

³⁶ Pacyna v. United States, No. 413-87C (Cl. Ct., Nov 9, 1987).

³⁷ Erroneously, in this writer's opinion, but this is a complex issue with legal support on both sides. MSG Pacyna correctly cited the Second Circuit's recent decision in *Blassingame v. Secretary of the Navy*, 811 F.2d 65 (2d Cir. 1987), for the proposition that he was not time barred from an APA review of the correction board's 1981 action (versus review of the 1952 action). The Third, Fifth, and Tenth Circuits would permit such reviews, at least in the context of (nonmonetary) military discharge upgrade cases or in the unique circumstance of a disability/medical discharge case. See *Dougherty v. United States Navy Board for Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986); *Geyen v. Marsh*, 775 F.2d 1303 (5th Cir. 1985), *reh'g denied*, 782 F.2d 1351 (5th Cir. 1986); and *Smith v. Marsh*, 787 F.2d 510 (10th Cir. 1986).

³⁸ Pacyna v. Marsh, 1988 WL 85942 (W.D.N.Y., Aug 15, 1988) (No. CIV-87-1531E).

³⁹ Indicating that a federal district court's *res judicata* dismissal of a Tucker Act case need not be appealed to the Federal Circuit.

⁴⁰ Judgment affirmed by *Pacyna v. Marsh*, 873 F.2d 1435 (2nd Cir., Feb 10, 1998) (Table), *cert. denied*, 493 U.S. 819 (U.S., Oct 2, 1989) (No. 88-2026) (Mem), *reh'g denied*, 493 U.S. 970 (U.S., Nov 13, 1989) (No. 88-2026) (Mem).

MSG Pacyna found additional legal tools in his rucksack because there appears to be another series of cases in 1992 in the Second Circuit and before the United States Supreme Court--all denying relief without comment.⁴¹ Although this is an outrageous example of wasteful and unproductive litigation, MSG Pacyna's saga demonstrates that merely providing unlimited judicial process can be counterproductive to an efficient and final resolution of a dispute. Master Sergeant Pacyna was a Private Ryan who drowned in litigation, using the tools Congress gave him.

C. Statutes of Limitation

In establishing the limited jurisdiction of federal courts, Congress enacted statutes of limitation to encourage timely resolution of disputes and prevent the payment of stale claims.⁴² United States federal district courts and the United States Court of Federal claims are both limited to hearing cases brought within six-year statutes of limitation.⁴³ However, even these straightforward statutes frequently spawn litigation in military personnel cases. The reason is that the Tucker Act and APA have created two completely separate, conflicting bodies of law.

⁴¹ *Pacyna v. Marsh*, 956 F.2d 1160 (2nd Cir., Jan 24, 1992) (No. 91-6196) (Table), *cert. denied sub. nom.*, *Pacyna v. Stone*, 506 U.S. 817 (U.S., Oct 5, 1992) (No. 91-1799), *reh'g denied*, 506 U.S. 1015 (U.S., Nov 30, 1992) (No. 91-1799).

⁴² "The statute of limitations is one of finality, designed to protect parties from stale claims and bar the possibility of court suits after a reasonable time has passed." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

⁴³ 28 U.S.C. § 2401(a), which applies to district courts, provides in part: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Similarly, 28 U.S.C. § 2501, provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Stark contrasts in legal rulings under these statutes have encouraged sophisticated plaintiffs to forum shop for better results.

Under the Tucker Act, the common law concerning the accrual and running of statutes of limitations has developed under logically consistent, uniform, and cohesive factors--all related to the central issue of when one can bring a nontort money claim against the U.S. Government.

Although the Tucker Act waives the Government's sovereign immunity from suit, it does not provide a substantive right to relief in the absence of an underlying money-mandating statute.⁴⁴

Thus, a prime focus for a court's inquiry in any case brought under the Tucker Act is "what is the basis for the money claim against the government, and when did it accrue?" Consequently, with only a few exceptions,⁴⁵ the law in the Federal Circuit interpreting the statutes of limitation is fairly clear, "a claim accrues when all events have occurred which fix the government's liability and entitle the claimant to institute an action."⁴⁶ In military pay cases, this usually means that the

⁴⁴ "Because the Tucker Act creates no substantive rights of action, a claimant must point to an independent basis for her claim and must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983), *quoting* *United States v. Testan*, 424 U.S. 392, 400 (1976).

⁴⁵ "The 'half-a-loaf' doctrine is an exception to the general rule that a plaintiff's claim for relief arises at the time of improper dismissal in military pay cases." *Homcy v. United States*, 536 F.2d 360, 364 (Ct. Cl. 1976) (permitting a claimant to return to court after the statute of limitations has run in order to obtain the full relief which he was entitled to receive as a matter of law). The "continuing claim doctrine" also allows a claimant to withstand a statute of limitations defense, but only with respect to those alleged wrongs occurring within six years of filing. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1581 (Fed. Cir. 1988). Additionally, case law supports "tolling" statutes of limitation in cases of fraudulent concealment of a cause of action. *Huntzinger v. United States*, 9 Cl. Ct. 90, 95 (1985), *aff'd*, 809 F.2d 787 (Fed. Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987).

⁴⁶ *Collins v. United States*, 14 Cl. Ct. 746, 751 (1988), *aff'd*, 865 F.2d 269 (Fed. Cir. 1988), *cert. denied*, 492 U.S. 909 (1989).

cause of action accrues at the time of the service member's separation from the service.⁴⁷

Under the APA, however, some military plaintiffs have been successful in arguing that their cause of action did not accrue at the time of their discharge, but accrued when the military correction board denied them relief.⁴⁸ Although these precedents properly should be limited strictly to cases involving nonmonetary relief under the APA, that distinction has been largely ignored.⁴⁹ The APA versus Tucker Act waters were muddied even further by the Supreme Court's decision in *Bowen v. Massachusetts*.⁵⁰ In *Bowen*, the Court concluded that a suit seeking monetary relief was not necessarily precluded by the APA's language limiting review to cases seeking "relief other than money damages." If *Bowen* were to be applied to military pay cases, it is quite possible that the APA could completely supplant the Tucker Act as the primary basis for legal review.⁵¹ Forum shopping would proliferate because interpretations of the statute of

⁴⁷ "A cause of action contesting a military separation--either the fact, circumstance, or characterization of that separation--accrues for the purposes of the statute of limitations, 28 U.S.C. § 2401(a), at the time of the service member's separation." *Hurick v. Lehman*, 782 F.2d 984, 986 (Fed. Cir. 1986).

⁴⁸ *Blassingame v. Secretary of the Navy*, 811 F.2d 65 (2d Cir. 1987), *and rev'd on other grounds*, 866 F.2d 556 (2d Cir. 1989); *Dougherty v. United States Navy Board for Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986); *Geyen v. Marsh*, 775 F.2d 1303 (5th Cir. 1985), *reh'g denied*, 782 F.2d 1351 (5th Cir. 1986); and *Smith v. Marsh*, 787 F.2d 510 (10th Cir. 1986).

⁴⁹ Since the APA does not divide final agency actions into separate and distinct causes of action, a great deal of time and effort in litigation must be dedicated to bringing these subtle distinctions to the courts' (and plaintiffs') attention. In *Geyen*, at least, the court recognized that certain issues considered by the correction board should be time barred, even though other nonmonetary matters (such as a request for an upgraded discharge certificate) were not time barred.

⁵⁰ 487 U.S. 879 (1988).

⁵¹ It is not at all clear that *Bowen* would apply to military pay cases, which traditionally have been litigated under the Tucker Act. But the issue will certainly be litigated in cases where plaintiffs would otherwise be time barred under the law of the Federal Circuit.

limitations in APA reviews are much more liberal than interpretations of the statute of limitations under the Tucker Act. The viability of the large body of law precluding circumvention of the Tucker Act would be cast into doubt.⁵² The Court of Appeals for the District of Columbia has already drawn a bright, but readily abused, line between Tucker Act and APA jurisdiction, holding that the Tucker Act is not applicable if the plaintiff does not specifically ask for money damages in the complaint.⁵³ The Eighth Circuit, on the other hand, permits plaintiffs to split a cause of action based upon a single military determination having both monetary and nonmonetary aspects, and maintain separate and simultaneous actions in a district court and the Court of Federal Claims.⁵⁴

Another major problem in determining the proper running of statutes of limitation in military cases is that the military correction boards have their own prescribed three-year time periods for applying for relief. The correction board statute provides:

No correction may be made...unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board...may excuse a failure to file within three years of

⁵² Plaintiff cannot circumvent the Claims Court's exclusive jurisdiction by framing a complaint in this court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States. *Cook v. Arentzen*, 582 F.2d 870, 873 (4th Cir. 1978); *See Sellers v. Brown*, 633 F.2d 106 (8th Cir. 1980); *United States v. City of Kansas City*, 761 F.2d 605, 608 (10th Cir. 1985); *Denton v. Schlesinger*, 605 F.2d 484, 486-88 (9th Cir. 1989).

⁵³ *See Wolf v. Marsh*, 846 F.2d 782 (D.C. Cir. 1988) (collateral consequences of equitable relief do not implicate the Little Tucker Act; plaintiffs must make a claim for money damages in the complaint); *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 533-35 (D.C. Cir. 1988) (where a plaintiff seeking a discharge neither seeks nor is granted monetary relief, the mere fact that a government payment of money is an automatic concomitant of the requested relief does not support little Tucker Act jurisdiction).

⁵⁴ *Shaw v. Gwatney*, 795 F.2d 1351, 1356-57 (8th cir. 1986); *Giordano v. Roudebush*, 617 F.2d 511, 514-15 (8th Cir. 1980).

discovery if it finds it to be in the interest of justice.⁵⁵

Due to the presence of the discretionary waiver provision in the statute, courts have not treated the correction boards' time period for filing applications as a true statute of limitations.⁵⁶ Instead, many courts review the military correction board's conclusion that an application is untimely under arbitrary and capricious or abuse of discretion standards.⁵⁷ Unfortunately, some courts and plaintiffs lose sight of the regulatory requirement⁵⁸ in this nonadversarial proceeding that the applicant has the burden of showing why the application is timely or why an untimely filing should be excused in the interest of justice.⁵⁹

⁵⁵ 10 U.S.C. § 1552(b).

⁵⁶ That is, as a jurisdictional matter which must be resolved before further adjudication of the case.

⁵⁷ See, e.g., *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995) (no persuasive reason to believe that Congress intended that waiver determinations be committed solely to agency discretion); *Evans v. Marsh*, 835 F.2d 609 (5th Cir. 1988); *Guerrero v. Stone*, 970 F.2d 626 (9th Cir. 1992); *Blassingame v. Secretary of the Navy*, 811 F.2d 65 (2d Cir. 1987); *Mullen v. United States*, 17 Cl. Ct. 578 (1989).

⁵⁸ Army Regulations provide:

If the claimant, his heir, or legal representative files an application more than three years after he discovers the error or injustice, he must include in his application his reasons why the Board should find it is in the interest of justice to excuse the failure to file application within the time prescribed.... 32 C.F.R. § 581.3(c)(2).

⁵⁹ One court has held that the correction boards cannot conclude that applications are untimely based solely upon the applicants' proffered reasons for a late submission, but must also consider the applicants' potential for success on the merits in order to determine whether it is in the interest of justice to waive the statute of limitations. See *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992). This logic is inconsistent with true statutes of limitation and forces the correction boards to perform cursory reviews and render cursory opinions on the merits of untimely records. Although the military correction boards routinely do check applications for obvious errors or injustices before rejecting them as untimely, it is quite another thing for a court to review that informal equitable consideration and subordinate the boards' statute of limitations to its

Another anomaly created by judicial interpretations in this area of the law is that the military's discharge review boards, separately established pursuant to 10 U.S.C. § 1553 have been judicially subordinated to the military correction boards established under 10 U.S.C. § 1552. The discharge review boards are authorized to change the nature of a military discharge, subject only to secretarial review (but can change little else); whereas, the correction boards are only empowered to make recommendations to their service secretaries (albeit on the almost unlimited spectrum of issues that are reflected in military records). The discharge review boards have a fifteen-year statute of limitations,⁶⁰ which may be followed by correction board reviews if there are additional issues for resolution, or if an applicant alleges an error or injustice by the discharge review board.

The different statutes of limitation which may come into play in military pay cases have yielded some unusual results. Private Ryan and his lawyers must determine whether the general federal six-year statutes of limitation apply; or whether that period is extended under the APA to six years after a military correction board acts (which may be nine years after the discharge, or any number of years later if the correction should have waived its statute of limitations in the interests of justice); or whether a complaint which includes a request to upgrade a discharge is reviewable up to twenty-four years after the discharge, as long as the complaint made it to the

administrative review on the merits, as a matter of law. Not only is this procedure administratively cumbersome, it turns the review process on its head by subjecting "cursory" reviews of stale claims to judicial review. The equities of waiving a correction board's statute of limitations to conduct an administrative review may be distinctly different from the legal merits of the underlying complaint.

⁶⁰ 10 U.S.C. § 1553(a) provides: "A motion or request for review must be made within 15 years after the date of the discharge or dismissal."

discharge review board within fifteen years, and then to the correction board within three years, and ultimately to a federal district court within six years after a final agency denial of relief. And by the way, does the Soldiers' and Sailors' Civil Relief Act⁶¹ (SSCRA) affect the statute of limitations?

D. The Soldiers' and Sailors' Civil Relief Act

The SSCRA was passed on the brink of World War II as a generous protective statute for service members who were called to active duty, in order to permit them to serve without distractions or prejudice to their civil rights.⁶² The statute includes a provision that tolls or suspends certain judicial and administrative proceedings involving service members. Section 525 of the SSCRA provides:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service...whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service....

Read literally, and without incorporating the Congressional intent behind the statute, this provision could have the absurd result of tolling all statutory and regulatory time limits for

⁶¹ The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-591.

⁶² Section 100 of the Act (50 U.S.C. § 510) states the purpose of the Act:

In order to provide for, strengthen, and expedite the national defense...provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military services...in order to enable such persons to devote their entire energy to the defense needs of the nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service....

internal military actions, appeals, and other proceedings involving active duty service members. All such actions could be tolled indefinitely during the service member's military career, with any time restrictions only beginning to run upon the service member's discharge. Thus, a senior military officer who served on active duty for thirty years could appeal his first officer efficiency report, make stale claims for household goods damaged throughout his career, and apply to the board for the correction of military records for resolution of any perceived error or injustice that occurred at any time during his career. Unfortunately, only one circuit court of appeals has recognized that the general SSCRA tolling provision should not apply to military boards and procedures specifically designed to address issues involving active duty service members.⁶³

Other circuits have reached the opposite conclusion, relying upon the plain language of the statute.⁶⁴ These circuits are probably in error,⁶⁵ but their holdings remain the law until Congress

⁶³ *Pannell v. Continental Can Co., Inc.*, 554 F.2d 216 (5th Cir. 1977). In *Miller v. United States*, 29 Fed. Cl. 107 (1993), a Court of Federal Claims judge specifically held that the SSCRA does not toll the military correction board's statute of limitations, but the weight of authority in the Federal Circuit generally presumes that the SSCRA tolls all statutes of limitation.

⁶⁴ *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir 1994); *Texaco, Inc. v. Ashland Chemical Co.*, 862 F.2d 242 (10th Cir. 1988); *Bickford v. United States*, 656 F.2d 636 (Ct. Cl. 1981); *Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975).

⁶⁵ Legislative intent should prevail over the plain language of a statute when there is a conflict and such intent can be clearly discerned. *United States v. American Trucking Co.*, 310 U.S. 534, 543-44 (1940), explains this fundamental rule:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that

clarifies the matter or the Supreme Court decides the issue. Meanwhile, one might surmise that Private Ryan would be as surprised as anyone to learn that he might legally ignore all the administrative board time constraints imposed by Army regulations while he served in the Army.⁶⁶ Clearly, Congress needs to reexamine and fix this rusting tool that's been sitting in Private Ryan's rucksack since 1940.

E. Exhaustion of Administrative Remedies

Military customs and traditions emphasize use of the military chain-of-command to effectively resolve soldiers' problems and complaints at the lowest possible level. Private Ryan learned in basic training that progressive use of the chain-of-command is expected by his superiors, and that the Army has spelled-out the "proper procedures" to follow for almost every imaginable situation. He may be somewhat surprised to learn that today he doesn't have to bother with all that--he can "jump" the chain and go straight into federal court to resolve his problems.

The long-standing judicial doctrine requiring the exhaustion of available administrative remedies before seeking relief in a court of law was founded upon some of the same principles that dictate use of the chain-of-command in a military context--logic, common sense, and organizational efficiency. The exhaustion doctrine avoids prematurely burdening the courts with

purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'

⁶⁶ That's certainly not the impression his basic training drill sergeant would have given him!

military matters which could be resolved administratively; it encourages the compilation of a complete administrative record focusing on the facts and legal issues involved; it permits full application of any specialized military expertise necessary to understand the issues; and it lessens any friction caused by judicial intervention into the military's business.⁶⁷

Despite the utility of the exhaustion doctrine, two problems have developed in litigation which will continue to confuse and frustrate both Private Ryan and his superiors until they are resolved by Congress. The first problem stems from the United States Supreme Court's decision in *Darby v. Cisneros*.⁶⁸ In *Darby*, the Court held that it is improper for courts to mandate exhaustion of administrative remedies in cases proceeding under the APA, unless there is a statute or agency regulation requiring such exhaustion.⁶⁹ If the requirement is established by mere regulation, the APA requires that the agency not execute the action until after judicial

⁶⁷ See generally Edward F. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969); THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 200, *Defensive Federal Litigation* (August 1996); Major Bill William T. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, ARMY LAW., Sep. 1994, at 3; Major Michael E. Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix For Darby v. Cisneros*, ARMY LAW., Feb 1997, at 3.

⁶⁸ 509 U.S. 137 (1993).

⁶⁹ The Court relied upon the plain language of the APA, 5 U.S.C. § 704, which states:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

review.⁷⁰ Since the prospect of delaying implementation of military personnel actions until after judicial review is obtained is not practical in the military, legislation to establish a statutory exhaustion requirement is necessary to comply with the APA's mandate as interpreted by *Darby*.

Another problem with the exhaustion doctrine is that the law in the Federal Circuit, where most military pay cases should be brought, does not require exhaustion of permissive administrative remedies.⁷¹ Moreover, the Federal Circuit does not toll its six-year statute of limitation for filing suit unless the plaintiff is exhausting mandatory administrative remedies.⁷² Resort to the military correction boards is not mandated for service members; it is an optional remedy.⁷³ Consequently, the law of the Federal Circuit discourages Private Ryan from pursuing available administrative remedies prior to filing suing in the Court of Federal Claims. If he, or his branch of service, takes too long to resolve his case administratively he could find himself time barred from obtaining further judicial relief. Congress could correct this disincentive to exhaustion of administrative remedies by simply amending the correction board statutes to mandate exhaustion.⁷⁴

⁷⁰ *Darby v. Cisneros*, 509 U.S. at 148, 152.

⁷¹ *Hurick v. Lehman*, 782 F.2d 984, 986-87 (Fed. Cir. 1986).

⁷² *Mistretta v. United States*, 120 F. Supp. 264, 266 (Ct. Cl. 1954).

⁷³ *Eurell v. United States*, 566 F.2d 1146, 1148 (Ct. Cl. 1977).

⁷⁴ Congress might also consider whether the record correction remedies and monetary damages available under the Privacy Act of 1974, 5 U.S.C. § 552a, should be available to service members, given that 10 U.S.C. § 1552 provides a more appropriate means for service members to amend their military records. Congress might find that certain sections of the Privacy Act are redundant with the military correction boards, are unnecessary as litigation tools for service members, and that they should be extracted from Private Ryan's rucksack. Courts have ruled both ways on this issue. The D.C. Circuit found that the Privacy Act should not supplant the

III. Proposals to Save Private Ryan

Virtually everyone who has carefully considered Private Ryan's plight in federal court during the past decade has determined that neither he nor his military superiors are well-served by the current system.⁷⁵ The common law pertaining to judicial review of military personnel decisions has become increasingly complex, confusing, and contradictory.

In 1993, the American Bar Association (ABA) made a recommendation:

that Congress should establish a readily accessible, centralized system of judicial review for military administrative discharges and other military administrative actions significantly affecting the rights of service members; and that this review should be accomplished by the United States Court of Military Appeals [renamed the "United States Court of Appeals for the Armed Forces" in 1994].⁷⁶

The ABA reported that "[t]he present system seems cumbersome and ineffective in several ways."⁷⁷ It observed that "[t]here has already developed a body of law concerning military administrative action which seems inconsistent and often contradictory — a situation which helps

correction board statute in *Glick v. Department of the Army*, 971 F.2d 766 (D.C. Cir. 1992) (*per curiam*); *see also* *Cargill v. Marsh*, 902 F.2d 1006, 1007-08 (D.C. Cir. 1990) (*per curiam*). *But see* *Diederich v. Department of the Army*, 878 F.2d 646, 647-48 (2d Cir. 1989) (exhaustion of military correction board remedy is not required).

⁷⁵ *See* Smith, note 67. Major Smith's article reviews a 1993 American Bar Association proposal to centralize military administrative appeals in the United States Court of Appeals of the Armed Forces; a 1990 Department of Justice proposal to exclude certain military administrative determinations from civil litigation and centralize judicial review in the United States Court of Federal Claims; and a similar, more modest, 1994 proposal by the Office of General Counsel, Department of the Air Force to centralize judicial review in the Court of Appeals for the Federal Circuit after mandatory exhaustion of administrative remedies at the military's correction boards.

⁷⁶ Peter Strauss, *Report to the House of Delegates: Recommendation*, 1993 A.B.A. SEC. ADMIN. L. & REG. PRAC. 3 [hereinafter "ABA REPORT"].

⁷⁷ ABA REPORT at 4.

neither the servicemember nor the Armed services."⁷⁸ The ABA Report concluded that "significant amounts of time, energy, and judicial assets are presently being consumed in preliminary matters — such as jurisdiction, venue, type of suit, and limits of monetary recovery — before a court addresses the merits of a cause."⁷⁹ The goal of the ABA's recommendation was to improve judicial review of military administrative matters by centralizing judicial review in a forum more familiar with the military establishment and capable of balancing its needs against the rights of servicemembers.⁸⁰ Deficiencies in the current system are apparent; the question is how best to proceed to remedy those deficiencies.

A. The Department of Defense Proposal

In 1996, along with directing the comprehensive review of the military correction boards discussed above,⁸¹ Congress called upon the Secretary of Defense to establish a five-member advisory committee to consider issues relating to the appropriate forum for judicial review of Department of Defense administrative military personnel actions.⁸² The Advisory Committee on

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Supra* note 15.

⁸² The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 551, 110 Stat. 318, directed the DOD committee to review and provide findings and recommendations regarding the following matters:

- (1) Whether the existing forum for review through the United States District courts provides appropriate and adequate review of administrative military personnel actions; and

Judicial Review of Administrative Military Personnel Actions of the Department of Defense (hereinafter "DOD Advisory Committee") reviewed the existing system of judicial review and found that "the complex, confusing, and, at times, inconsistent procedural and substantive rules in the various United States district courts and United States Court of Federal Claims do not appropriately or adequately serve our nation's military personnel, its veterans, or the military services."⁸³ The DOD Advisory Committee drafted legislative changes "to direct the primary review of military personnel decisions to the Boards for the Correction of Military, Naval, and Coast Guard Records...with centralized review of a correction board's decision in the United States Court of Appeals for the Federal Circuit."⁸⁴ The DOD Report also recommended "that the narrow category of military personnel decisions that are not reviewable by a correction board continue to be brought in the district courts, but without regard to the amount in controversy and with centralized appeal to the Court of Appeals for the Federal Circuit."⁸⁵

The DOD Report includes two formal findings and eight recommendations. The Report concluded that the current system of judicial review of administrative military personnel decisions was "the antithesis of an equitable and efficient system" and that it "requires

(2) Whether jurisdiction to conduct judicial review of such actions should be established in a single court in order to provide a centralized review of these actions and, if so, in which court that jurisdiction should be vested.

⁸³ REPORT, DEPARTMENT OF DEFENSE, NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 1996, SECTION 551, *Report of the Committee on Judicial Review of Administrative Military Personnel Actions of the Department of Defense*, 1 [hereinafter "DOD REPORT"].

⁸⁴ *Id.*

⁸⁵ *Id.*

improvement."⁸⁶ The Report recommends: (1) mandatory exhaustion of administrative remedies through the military correction boards before permitting judicial review⁸⁷; (2) improving the administrative records of decisions rendered by the correction boards⁸⁸; (3) clarifying and restoring the correction boards' three-year statute of limitation to nullify the unintended effect of case law misinterpreting a tolling provision contained in the Soldier's and Sailor's Civil Relief Act (SSCRA)⁸⁹; (4) retaining district court review of military issues not reviewable by correction boards, but consolidating appellate review of those decisions in one appellate jurisdiction⁹⁰; (5) establishing first consideration by the correction boards prior to judicial review of claims that mix pure legal issues with specific requests for administrative relief⁹¹; (6) centralizing judicial review of administrative military personnel cases in one appellate body--the Court of Appeals for

⁸⁶ *Id.* at 9-10.

⁸⁷ "A final decision by the Secretary concerned and the exhaustion of remedies available through the appropriate correction board should be required before petitioning for judicial review of an administrative personnel decision." *Id.* at 11.

⁸⁸ "The correction board should produce, in each case, a record of decision which is satisfactory for purposes of judicial review." *Id.*

⁸⁹ "Military members should have three years from the date of discovery of an error or injustice to file an application with the appropriate correction board." *Id.* at 13.

⁹⁰ "Cases involving challenges to personnel practices, policies, or decisions which are not subject to review by the corrections board should be committed to the federal district courts as the primary forum for the resolution of these disputes. However, appeal of district court decisions should be centralized in one appellate jurisdiction." *Id.* at 14.

⁹¹ "A case of a general claim against a Service Secretary involving constitutional and other challenges to statutes, regulations, and policies is ordinarily outside the purview of the corrections board. However, these cases are occasionally combined with a request for relief within the jurisdiction of the correction board. These 'mixed cases' should first be considered by the correction boards." *Id.*

the Federal Circuit⁹²; (7) codifying the "arbitrary and capricious" standard of judicial review for military personnel cases and including a "harmful error" analysis for procedural errors⁹³; and (8) codifying the common law jurisdictional bar to judicial review of certain matters that are not justiciable.⁹⁴ Attached to the DOD report is draft legislation and a proposed sectional analysis for the "Military Personnel Review Act of 1977."⁹⁵

B. The ABA Response

In August 1997, the American Bar Association House of Delegates adopted a resolution calling for Congress to hold hearings and comprehensively review the matter before accepting the DOD's legislative proposal.⁹⁶ The ABA's policy resolution reads:

RESOLVED, That the American Bar Association recommends that the current procedures for judicial review of military administrative personnel actions not be modified, and that the legislation entitled the "Military Personnel Review Act of 1997" not be enacted, until Congress has had an opportunity to hold hearings and to conduct a thorough review of the entire system for correction of military records, including a review of both the report of the Secretary of Defense

⁹² "Judicial review should be centralized. Exclusive jurisdiction should be with the Court of Appeals for the Federal Circuit to hear and decide appeals of the final decisions of the Secretary concerned under 10 U.S.C. § 1034 and § 1552." *Id.* at 15.

⁹³ "The court should hold unlawful and set aside any action it finds to be arbitrary, capricious, or otherwise not in accordance with law; contrary to a constitutional right; or without observance of procedure required by law, but only if the irregularity substantially prejudiced the petitioner's right to relief." *Id.* at 16.

⁹⁴ "The Court of Appeals for the Federal Circuit should not have jurisdiction to entertain any matter or issue raised in a petition for review that is not justiciable." *Id.* at 17.

⁹⁵ *Id.* at Tabs C and D, respectively.

⁹⁶ Memorandum from Robert D. Evans, Director, Governmental Affairs Office, ABA, to Senator Strom Thurmond, Chairman, Senate Armed Services Committee (August 19, 1997).

mandated by Congress in § 554 of the National Defense Authorization Act of 1996, and the report of the Advisory Committee mandated by § 551 of that Act.⁹⁷

The ABA's Report to the Resolution,⁹⁸ the document providing unofficial background and legislative history on the issue, alleges that there are "inconsistencies and inaccuracies" in the DOD proposals and suggests the need for Congressional hearings to "obtain perspectives and input from experts outside the government that were not considered in the two DOD reports."⁹⁹

The ABA Report advocates that the DOD proposal to change the current system of judicial review of administrative military personnel decisions should be evaluated in conjunction with the fairness of the military correction boards' administrative review process.¹⁰⁰ The Report also urges Congress to consider views from members of the private bar and persons experienced in seeking relief for service members.¹⁰¹

C. Potential Middle Ground

While Congressional hearings and further study may be appropriate, Private Ryan and his military superiors should not be left floundering indefinitely. It has been over a decade since these problems first came to light. Congress has already addressed and remedied the most significant deficiency in the military correction board process--untimely decisions--by mandating

⁹⁷ *Id.*

⁹⁸ Submitted by the Bar Association for the District of Columbia and attached to the ABA memorandum [hereinafter "ABA RESOLUTION REPORT"]. *Id.*

⁹⁹ *Id.*, ABA RESOLUTION REPORT at 3.

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 5.

shorter processing times. There is no reason to believe that these benchmarks will not be met, as they are accompanied by annual reports and Congressional oversight.¹⁰²

The ABA has criticized the DOD legislative proposal as being weighted more heavily in favor of the government than Private Ryan.¹⁰³ While that may or may not be the case, depending upon one's perspective, there are two alternatives to the DOD proposals which may strike a better balance in the eyes of Private Ryan and his lawyers. These alternatives might also enhance Congressional confidence in the other elements of the DOD legislative proposal and diminish the need for additional delay for further study and review. Both measures would improve the state of the law without compromising Private Ryan's right to judicial review.

First, instead of eliminating access to the United States Court of Federal Claims and vesting exclusive appellate jurisdiction in the United States Court of Appeals for the Federal Circuit, Congress could retain the Court of Federal Claims as an available trial court forum. Few military personnel cases actually ever require a trial on the merits; most are resolved on cross-motions for summary judgment.¹⁰⁴ However, preserving the Court of Federal Claims as a trial

¹⁰² It should be noted, however, that Congress has not allocated additional resources to the military correction boards. Shorter processing times are to be gained by organizational restructuring and increased efficiencies within the correction boards. A three-year personnel freeze prevents reductions in the current size of correction board staffs, but the staffs were not increased in size to process backlogs. Presumably, if a correction board fails to achieve the new timeliness standards, Congress will review the matter and respond accordingly.

¹⁰³ ABA RESOLUTION REPORT at 9. *See also* Smith, *supra* note 67, at 30.

¹⁰⁴ This is because judicial review of correction board decisions is usually limited to review of the administrative record. *See* Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). The military correction boards do not conduct adversarial proceedings; they have no active mechanisms for gathering facts or evidence. There is no advocate for the government in the correction board process; only the presumption of regularity and service advisory opinions guide the boards. Accordingly, the regulatory burden of proof is placed on applicants to

forum would permit Private Ryan to have his day in court, should that prove necessary. It would also safeguard the government from the potentially devastating effects an adverse ruling in the Federal Circuit could have on military personnel policies and programs. At that level, the only recourse to the government to challenge an adverse decision would be to seek a rehearing by the panel, seek *en banc* reconsideration, or petition the United States Supreme Court for *certiorari*. These alternatives are not readily obtained and invoke higher standards for approval within the Department of Justice for their execution.¹⁰⁵ Preserving the trial forum would provide all parties an opportunity to appeal adverse decisions in the normal manner.

The ABA Resolution Report correctly points out that there are significant differences between the military correction boards and the Merit Services Protection Board (MSPB) system for civilian employees, which the DOD Report was using as an analogy for its proposal for appellate review in the Federal Circuit.¹⁰⁶ Since Congress subsequently adopted the DOD Correction Board Study's recommendation to preserve the current military correction board system, the ABA can fairly criticize DOD's proposal for the creation of a system of judicial review that would "parallel" the MSPB system. Retaining the Court of Federal Claims in the judicial review process for military personnel cases eliminates the need to dissect and compare

demonstrate the existence of an error or injustice by producing sufficient evidence to adequately support their contentions.

¹⁰⁵ Generally, the Solicitor General will approve trial court appeals if the agency's case has substantial importance to the government and if the government's legal position has a reasonable basis. However, a higher standard requiring exceptional importance may apply to petitions for *certiorari*. Moreover, should all military personnel cases be heard in a single judicial circuit, the "split among circuits" rationale often precipitating Supreme Court consideration would become unavailable.

¹⁰⁶ ABA RESOLUTION REPORT at 8.

the MSPB system with the military correction boards.

A second compromise is available for DOD's proposed amendment of the military correction boards' statute of limitation. The ABA Report contends that the effect of the DOD proposal is to "impose more strict statute of limitations periods."¹⁰⁷ The DOD Report recommends keeping the three-year statute of limitations, but precluding judicial review of correction board decisions to waive the time limitation in the interest of justice.¹⁰⁸ Neither report fully addresses the problems and aberrations¹⁰⁹ inherent in having a correction board statute of limitations that differs from the jurisdictional statutes of limitation for federal courts. A compromise, which would greatly simplify the law and clearly benefit Private Ryan, would be to lengthen the correction boards' statute of limitations to six years, commensurate with federal court jurisdiction. This change, coupled with mandatory exhaustion of administrative remedies and language directing the proper forum and timing¹¹⁰ of judicial review, would greatly simplify and coordinate the total adjudicative process and reduce wasteful litigation over the issues discussed in part IIC of this article. Retaining the authority to waive the statute of limitations in the interest of justice, without judicial review of that equitable extension of time, would preserve

¹⁰⁷ *Id.* at 7.

¹⁰⁸ DOD REPORT at 13 and Tab C-4.

¹⁰⁹ The fact that the correction board statute bars review six years earlier than a federal court's own six-year statute of limitations forces potential applicants to file suit rather than exhaust their administrative remedies. It also spawns litigation over the doctrine of laches, when a delay in bringing suit is alleged to have prejudiced the government's ability to defend itself, yet the available time for judicial review may not yet have expired under a statute of limitations.

¹¹⁰ To avoid litigation, the prescribed timing for judicial review of correction board decisions should specify the time available for filing suit. Alternatively, provisions tolling the running of judicial statutes of limitation during the administrative review process might be necessary.

the boards' ability to correct errors, remedy injustices, and fashion equitable relief on a case-by-case basis without necessarily subjecting the government to pay monetary damages beyond Congress's specified jurisdictional limits for federal courts.¹¹¹

IV. Additional Matters

There are some additional matter which have presented themselves in civil litigation subsequent to the DOD study. These issues should be addressed by Congress in order to complete its comprehensive legislative package for judicial review of military personnel actions. These issues relate to DOD's proposed codification of the "harmless error" standard¹¹² and are critical additions--legislative inaction could unnecessarily subject the United States to substantial liability and diminish the military correction boards' utility in remedying systemic problems in military personnel administration. Congress needs to codify the retrospective process by which the military services, acting through their correction boards, provide complete administrative

¹¹¹ For example, a military correction board might waive its statute of limitations to consider whether a decorated Korean War veteran was illegally discharged, in light of new information presented by the veteran's heirs. If the correction board denies relief, but a federal court later reverses the board's determination, the litigious issue of appropriate relief presents itself. Some case law suggests that the original "illegal" discharge is "void" as a matter of law, resulting in the retrospective conclusion that since the soldier was never properly discharged, he retained his active duty status until some later supervening event (usually mandatory retirement laws) legally would have terminated his right to active duty military pay (and commenced his entitlement to retired pay). The soldier's heirs could claim that they are entitled to legal damages (his back pay, allowances, and retirement pay) based upon military pay and retirement statutes (which direct pay entitlements based upon military status). Any monetary damages awarded in this situation would be contrary to the intent of Congress in establishing the six-year statutes of limitation which define the jurisdictional limits of federal courts. Litigation over damages would result even if it were clear that the military correction board waived its statute of limitations solely for the purpose of granting the veteran some form of equitable relief (i.e., a discharge upgrade).

¹¹² DOD REPORT, at 17.

relief subsequent to administrative or judicial invalidation of a particular process or military board action. That is, the military services require a statute, similar to the remedial special selection board (SSB) promotion statute,¹¹³ which permits the military services to correct their personnel mistakes administratively and retroactively. Additionally, the existing SSB statute requires amendment to ensure that the SSB process can be applied to improperly constituted promotion boards and promotion boards which are found to have constitutional or regulatory defects infecting the entire board process. Otherwise, Federal Circuit common law could preclude application of SSBs to judicially invalidated proceedings and result in substantial liability.

The Federal Circuit's recent decision in *Porter v. United States*¹¹⁴ brings these issues into focus. In *Porter*, the Federal Circuit reversed a decision by the Court of Federal Claims and sanctioned use of the military's remedial SSB process for an Air Force officer who was passed over for promotion due to a faulty Officer Effectiveness Report (OER) in his record. Captain Porter sought to establish that once his discharge was overturned, he was legally entitled to back pay and allowances until such time as he was properly discharged.¹¹⁵ The government argued that the SSB statute was designed to preclude that result, and that contrary common law

¹¹³ 10 U.S.C. § 628. This statute specifies the process and conditions under which promotion board errors are to be remedied.

¹¹⁴ 163 F.3d 1304 (Fed. Cir. 1998).

¹¹⁵ Military officers serve under a statutory "up or out" promotion scheme wherein two nonselections ("passovers") for promotion may result in a discharge from military service. See 10 U.S.C. §§ 631 & 632. Thus, Captain Porter was challenging his ultimate discharge from the Air Force by challenging the correctness of his military personnel file which, if found defective, could have tainted the promotion selection process and led to his two passovers for promotion and his subsequent discharge.

precedent was no longer applicable after Congress codified the SSB process. The captain would only become entitled to back pay and allowances if the defect in his records caused his nonselection. The SSB process was the impartial mechanism by which Captain Porter could be reconsidered for promotion based upon his corrected military personnel file. The SSB process was designed to purge defects in the original action, reevaluate the officer's promotion potential at the time of the original nonselection, and make a promotion decision that would operate retroactively if the officer were selected. No relief would be forthcoming for officers who were again nonselected by the SSB. In essence, the SSB process was to serve as a fair and objective way to determine whether an error in an officer's record constituted "harmful error" and tainted the previous board's selection process.

The government successfully persuaded the Federal Circuit that the SSB process was designed to correct promotion errors retroactively.¹¹⁶ An officer's promotion would be given retrospective effect and new records substituted for the invalidated actions. Only then would pay and other entitlements be recalculated. This remedial process essentially applies a "harmful error" test before relief is granted. It promotes deserving officers, but denies economic windfalls for officers who are not recommended for promotion after fair reconsideration by a SSB.

Despite a favorable¹¹⁷ result in *Porter*, the case presents two significant problems. *Porter*

¹¹⁶ After candidly commenting that "the technical aspects of this case and of the underpinnings of our predecessor court's holdings are complex," the court held that the Air Force correction board could apply the SSB process and substitute that action for the original action without necessarily first voiding Captain Porter's discharge and awarding him back pay and allowances until the date a new discharge was actually issued. *Porter*, 163 F.3d at 1306.

¹¹⁷ Private Ryan would not be offended that officers are not entitled to windfall damages if they are fairly reconsidered for promotion but not selected.

does not apply to other administrative selection boards outside the promotion board context¹¹⁸ and might not even apply to promotion boards which are judicially invalidated in their entirety. Without the SSB statute to guide its analysis, the court undoubtedly would have applied earlier case law,¹¹⁹ which generally supports the proposition that a discharge found to be unlawful is "void" (rather than merely voidable for errors which the government can demonstrate were harmless). In *dicta*, the *Porter* court stated:

Without deciding, we might speculate that other kinds of error would qualify for an Air [Force Correction] Board conclusion that the demonstrated error vitiates the initial passovers. Matters such as impermissible consideration of race, sex or religion, or instances of an illegally composed selection board (one thus incapable of producing a legal result) come to mind.¹²⁰

The court made its observation based upon *Doyle v. United States*, which held that the harmless error test is inapplicable to a fundamental "procedural violation [that] penetrates to the heart of the process Congress deemed necessary for fair judgment in promotion...."¹²¹ The *Porter* court reasoned that "[c]learly underpinning this holding is the logical proposition that an illegally composed selection board cannot produce lawful decisions."¹²² Given this legal precedent, it is

¹¹⁸ For example, the military's Selective Early Retirement Board (SERB) system, which follows certain procedures and receives instructions similar to promotion boards, has no statutory mechanism for making retroactive administrative corrections. See generally 10 U.S.C. §§ 638 & 638a.

¹¹⁹ See *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979); *Doyle v. United States*, 599 F.2d 984 (Ct. Cl. 1979).

¹²⁰ *Porter*, 163 F.3d at 1321.

¹²¹ *Doyle*, 599 F.2d at 996. The promotion board in question failed to have reserve officer membership as directed by statute.

¹²² *Porter*, at 1317. A contributing factor in *Doyle* to this unfortunate language was the fact that the military correction board's actions in that case did not fully and completely reconstitute and

unlikely that the Federal Circuit would permit the military services to correct retroactively fundamental promotion board errors in composition or execution, without also awarding retroactive damages for all affected officers, regardless of whether the procedural defect caused the officers to be nonselected.

In order to avoid damages to unaffected parties every time a court retroactively invalidates a military promotion board process, the SSB statute should be amended to clearly provide that the SSB remedial scheme shall be applied even in cases of fundamental board defects. The military services can completely and fairly reconstruct defective promotion boards and conduct them in accordance with the law. They should not be forced to grant relief to officers who, demonstrably, were not adversely affected by the defect.

Similarly, the SSB statute should be amended to encompass other administrative boards, or Congress should create an analogous statute to accomplish the same result for all other administrative boards and actions. Without such authority, the military services may be thrown

replicate the defective board it was purporting to replace. Consequently, courts have freely repeated the term "void" (rather than "voidable") to describe the legal character of the original defective board action. However, if the original promotion board's action were truly void *ab initio*, the ultimate legal result would seem to be that those officers who were selected for promotion by the defective board would not be promoted and should be "demoted" back to their previous military ranks. There is no indication that such an adverse corrective action was executed after *Doyle*, nor any indication of the legal basis for possibly ratifying the otherwise void promotions. *Doyle* recognized that the military correction boards are only empowered to make favorable record changes or deny relief; they do not change military records adversely. *Doyle*, 599 F.2d at 1000 (the Secretary has the power to correct records in favor of servicemen and never against them). However, that does not explain the court's own use of the term "void" nor explain what that legal conclusion meant for officers who were selected for promotion. One might argue that what the court should have said is that a defective promotion board is voidable, but must be voided, as a matter of law, for all officers adversely affected by the defect. The burden would properly fall on the government to demonstrate harmless error (which it could do for all officers selected for promotion notwithstanding the defect), or void the proceedings for all those who were harmed by the defect.

into turmoil whenever years of policy or practice are overturned by a civil court.¹²³ Since judicial pronouncements operate both retrospectively and prospectively when invalidating a past administrative policy or procedure, the military services need a mechanism for retrospectively "fixing" such defects without suffering substantial liability. The inherent authority of military correction boards to fashion equitable relief and apply legal fictions to correct errors and injustices in military records has simply not proven to be sufficient reason in the past for courts to ignore what seems to be binding precedent to grant relief without applying a harmless error analysis. Without legislation, *Porter* portends that will continue to be the rule for military pay cases in the Federal Circuit.

V. Conclusion

It is time for Congress to act and lighten the load Private Ryan and the military services have been carrying for so many years. The DOD Military Personnel Review Act of 1997 provides an excellent foundation for moving these important issues forward. Congress should act on the ABA's suggestion to obtain additional perspectives on the matter, but the legislative process should not be unreasonably delayed for that purpose alone--even the plaintiff's bar acknowledges that the law pertaining to judicial review of military administrative personnel matters needs to be fixed. The question for Congress is not whether legislation is needed. The issue is which approach will best correct the current deficiencies in the law and provide a comprehensive system of administrative and judicial review for military personnel decisions which will best serve Private Ryan and the military services well into the 21st Century.

¹²³ The *Doyle* decision precipitated such turmoil within the Department of the Army.

This paper suggests two alternatives to recommendations contained in the DOD Report. The suggestions to retain the jurisdiction of the Court of Federal Claims in the judicial review process and increase the correction boards' statute of limitations to six years may simplify the effects of the proposed legislation, pacify certain concerns raised by the ABA, and better balance the interests of Private Ryan with the needs of the military services.

Recent developments in military personnel litigation may aggravate the government's liability for mistakes made in military personnel management practices. The SSB process is a proven success, but the statute doesn't go far enough to keep courts from returning to judicially created formulas in old precedent. Further Congressional action is required to apply the SSB process to all promotion boards--even those that are found to be fundamentally defective in composition or operation. A similar remedial process is needed for all other kinds of administrative boards. Both of these issues can and should be considered in conjunction with the current legislative proposals before Congress. As the military correction boards attempt to meet recent Congressional direction for greater efficiencies and reduced processing times to better serve Private Ryan, all that remains is for Congress to ensure that the military's administrative process is saved from inefficient and wasteful civil litigation.